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We May Yet Have a Quiet Environment: The New California Airport Noise Regulations

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COMMENTS

WE MAY YET HAVE A QUIET ENVIRONMENT: THE NEW CALIFORNIA AIRPORT NOISE REGULATIONS

The high-pitch scream of a jet passing a few hundred feet overhead has caused a great number of people to despair over the advance in our space technology.¹ Noise from our major airports has made normal living impossible in areas as far as five miles from an airport.² Within these areas airport noise not only disrupts conversation, sleep, and education,³ but also reduces property values.⁴ In an attempt to compensate for this interference with living habits, residences, schools, churches, hospitals, and all other uses entitled to reasonable peace must be insulated against noise.⁵ Consequently, aircraft noise has recently been classified as the number one problem facing civil aviation.⁶ Unfortunately, existing legal principles applicable to the airport noise problem contribute very little, if at all, to its solution.⁷ Recognizing the weaknesses in the current law, the California Department of Aeronautics (hereinafter referred to as DOA) recently adopted Airport Noise Regulations⁸ (hereinafter referred to as Regulations) which represent the strongest effort yet to abate airport noise. This comment analyzes existing law and the Regulations as they relate to airport noise.

COMMON LAW METHODS OF AIRPORT NOISE ABATEMENT

Prior to the adoption of the Regulations, California residents had to look to the common law for protection against undesirable noise. Property owners employed two common law doctrines in an

¹ "A few years ago it was a popular pastime to visit airports and to watch aircraft operations. Today, as a result of noise . . . airports are considered bad neighbors and their growth is often opposed." DOT-NASA, CIVIL AVIATION RESEARCH AND DEVELOPMENT POLICY STUDY 2-4 (1971).

² Berger, *Nobody Loves An Airport*, 43 S. CAL. L. REV. 631, 737 (1970).

³ DOT-NASA, CIVIL AVIATION RESEARCH AND DEVELOPMENT POLICY STUDY 5-3 (1971). As an example of the degree of disruption airport noise may cause, the authors note that the area affected by excessive noise around the John F. Kennedy Airport in New York includes 35,000 dwellings, 22 public schools, and several dozen churches and clubs.

⁴ Berger, *Nobody Loves An Airport*, 43 S. CAL. L. REV. 631, 665-78 (1970).

⁵ *Id.* at 737.

⁶ DOT-NASA, CIVIL AVIATION RESEARCH AND DEVELOPMENT POLICY STUDY 2-4, 2-6, 5-3 (1971).

⁷ See notes 9-39 and accompanying text, *infra*.

⁸ Title 4, CAL. ADM. CODE §§ 5000-5080.5 (1970).

attempt to protect their interests, inverse condemnation and nuisance.⁹ However, as noise abatement techniques, these tools provide little hope to persons living in the vicinity of airports who desire to reside in a quiet, peaceful environment.

Inverse Condemnation

Inverse condemnation may provide a remedy to individuals for damages to property caused by airport interference. In order for this cause of action to succeed, there must be a taking of private property for public use in violation of the fifth amendment to the United States Constitution.¹⁰ In the federal courts and a majority of the state courts, a "taking" has been found to exist in two situations. One is where there are low and frequent flights of aircraft directly over a person's property which cause interference so substantial as to deprive the owner of the practical enjoyment of his property and reduce its fair market value.¹¹ The other type of "taking" occurs when the noise and vibrations from lateral flights are so great as to make the property uninhabitable.¹² Therefore, in jurisdictions which support the majority view, noise absent overflight will result in a "taking" only when the noise causes a total impairment of the property's utility;¹³ whereas in the overflight situation, a court merely has to determine that the noise from the overflights diminishes the property's fair market value.

Application of this distinction works an inconsistent and unjust result in specific situations. For example, where the noise of aircraft flying directly overhead reduces the fair market value of the property, a court will find a "taking." However, where noise of aircraft flying over land adjacent to the same piece of property creates a similar decrease in its fair market value but does not totally impair its utility, a court will not find a "taking." Because the damage in both situations is exactly the same, the results reached by the courts are inconsistent.

Recognizing this problem of inconsistency and relying on the position taken by courts in other jurisdictions,¹⁴ a recent Califor-

⁹ For an extensive discussion of inverse condemnation and nuisance suits as airport noise abatement methods see Berger and Fadem, *A Noisy Airport Is A Damned Nuisance*, 3 Sw. U.L. REV. 39 (1971); and Comment, *The Jet Set and the Law: Developments in Aircraft Noise Law in California*, 1 PACIFIC L.J. 581 (1970).

¹⁰ "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

¹¹ *United States v. Causby*, 328 U.S. 256 (1946).

¹² *Batten v. United States*, 306 F.2d 580 (D.C. Cir. 1962).

¹³ *Id.* at 585.

¹⁴ *Thornburg v. Port of Portland*, 244 Ore. 69, 415 P.2d 750 (1966); *Martin v.*

nia case, *Nestle v. City of Santa Monica*,¹⁵ held that aircraft noise resulting from either direct overflights or lateral flights will cause a "taking" where the noise diminishes the fair market value of the property.¹⁶ The plaintiffs in *Nestle* sought damages from Santa Monica Municipal Airport as a result of the noise produced by aircraft traversing land adjacent to the plaintiff's property.¹⁷ The federal requirements for a cause of action—direct overflights or total impairment of the property's utility—were noted.¹⁸ However, the court rejected the claim that this was the proper law to apply.¹⁹ Instead, the court followed the opinion of the Supreme Court of Oregon in the case of *Thornburg v. Port of Portland*,²⁰ where it was stated:

The proper test to determine whether there has been a compensable invasion of the individual's property rights . . . is whether the interference with use and enjoyment is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to support a conclusion that the interference has reduced the fair market value of the plaintiff's land by a sum certain of money.²¹

In adopting this test as the law to apply in inverse condemnation suits arising out of aircraft noise, the court in *Nestle* has set a precedent for California courts. Since the holding resolves the inconsistency that exists in federal law, it represents a welcome change in California's law of inverse condemnation.

Despite California's more liberal approach to inverse condemnation actions based on noise considerations, this doctrine remains an ineffective legal principle to apply towards airport noise abatement. Proving a "taking" merely allows an after-the-fact recovery for damage done. It does nothing to prevent airport noise levels from increasing. That is, where the fair market value of a person's property has been diminished due to noise from airport operations, he may bring suit in inverse condemnation and recover the difference between the actual value of his property and the fair market value. However, his recovery does not preclude airports from increasing their operational noise levels and thereby inflicting greater property damage in the future.

Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964), cert. denied, 379 U.S. 989 (1965); *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 348 P.2d 664 (1960). All of these courts held there could be a taking of property due to noise despite the absence of overflights where the noise diminished the fair market value of the property.

¹⁵ 19 Cal. App. 3d 869, 97 Cal. Rptr. 235 (1971).

¹⁶ *Id.* at 880-82, 97 Cal. Rptr. at 242-43.

¹⁷ *Id.* at 877-79, 97 Cal. Rptr. at 239-40.

¹⁸ *Id.* at 879-80, 97 Cal. Rptr. at 240-41.

¹⁹ *Id.* at 879-82, 97 Cal. Rptr. at 241-43.

²⁰ 244 Ore. 69, 415 P.2d 750 (1966).

²¹ *Id.* at 71, 415 P.2d at 752.

Nuisance

The California legislature defines nuisance as "[a]nything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property"²² This definition may be sufficient for the vast majority of airports to qualify as nuisances to nearby property owners. However, California rejects the nuisance theory as a basis for recovering damages against a publicly-owned airport even though the noise of that airport's operations may unreasonably interfere with a person's enjoyment of his property.²³ In defense of this rejection, the courts²⁴ rely on California Government Code Section 815 which states, "[A] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person. . . ."²⁵

Notwithstanding the governmental immunity from damages, airport operations may be enjoined pursuant to California Code of Civil Procedure Section 731(a)²⁶ which provides that airport operations may be deemed a nuisance and enjoined when they are proven to be "unnecessary and injurious methods of operation."²⁷ In *Loma Portal Civic Club v. American Airlines, Inc.*,²⁸ the California Supreme Court held that airport operations will not be found to be "unnecessary and injurious" under Section 731(a) unless they are imminently dangerous and inconsistent with the public interest which supports the continuation of such operations.²⁹ To date there are no reported cases which have made this necessary finding. However, the court cited *Anderson v. Souza*³⁰ as standing for the proposition that an injunction will issue in certain limited circumstances

²² CAL. CIV. CODE § 3479 (West. 1970).

²³ *Nestle v. City of Santa Monica*, 19 Cal. App. 3d 869, 97 Cal. Rptr. 235 (1971).

²⁴ *Id.*

²⁵ CAL. GOV'T CODE § 815 (West. 1966).

²⁶ "Whenever any city, city and county, or county shall have established zones or districts under authority of law wherein certain manufacturing or commercial or airport uses are expressly permitted, except in an action to abate a public nuisance brought in the name of the people of the State of California, no person or persons, firm or corporation shall be enjoined or restrained by the injunctive process from the reasonable and necessary operation in any such industrial or commercial zone or airport of any use expressly permitted therein, nor shall such use be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation. Nothing in this act shall be deemed to apply to the regulation and working hours of canneries, fertilizing plants, refineries and other similar establishments whose operation produce offensive odors." CAL. CIV. PRO. CODE § 731(a) (West 1955).

²⁷ *Id.*

²⁸ 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964).

²⁹ *Id.* at 590, 394 P.2d at 553, 39 Cal. Rptr. at 713.

³⁰ 38 Cal. 2d 825, 243 P.2d 497 (1952).

absent a showing of "unnecessary and injurious operations."³¹ In *Souza* the court held that an airport's operations could be enjoined where such operations created a nuisance in the surrounding community.³² The findings showed that the noise had destroyed the peace of the adjacent homes making it impossible to get adequate sleep, drowning out normal conversation, and making it impossible to use the radio or the telephone.³³ The *Souza* court qualified its holding by noting that it applied only to a privately-owned airport, the establishment of which required no finding by a public agency as to public necessity.³⁴

The *Loma Portal* case involved a public airport, and the court determined that the airport's operations could not be deemed an enjoicable nuisance unless the operations were proven "unnecessary and injurious."³⁵ This represents a higher degree of proof than required in *Souza*.³⁶ However, despite the divergent results in the two cases, the *Loma Portal* court found its holding consistent with *Souza* on the ground that *Souza* involved a private airport whereas *Loma Portal* involved a public airport, the establishment of which required a finding of public necessity.³⁷

In September, 1968, the California Public Utilities Code was amended³⁸ so that both public and private airports are subject to the same statutory requirements before the DOA will issue operating permits.³⁹ Therefore, subsequent to this date, the holding of *Loma Portal* applies in all actions seeking to enjoin airport operations, whether the airport involved is public or private. Due to the unwillingness of the courts to find airport operations "unnecessary and injurious," it appears futile to attempt to enjoin airport operations in the future.

THE CALIFORNIA AIRPORT NOISE REGULATIONS

Recognizing the inadequacies in the common law methods of noise abatement, the DOA adopted the Regulations as a statutory attack on the problem. The Regulations represent an effort to provide uniform controls for airport noise abatement by establishing

³¹ 61 Cal. 2d at 590, 394 P.2d at 553, 39 Cal. Rptr. at 713.

³² 38 Cal. 2d 825, 243 P.2d 497 (1952).

³³ *Id.* at 829-830, 243 P.2d at 500.

³⁴ *Id.* at 848, 243 P.2d at 508.

³⁵ 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964).

³⁶ *Cf.* 38 Cal. 2d at 829, 243 P.2d at 500.

³⁷ 61 Cal. 2d at 590, 394 P.2d at 553, 39 Cal. Rptr. at 713.

³⁸ Cal. Stats., 1968, ch. 791, § 2, at 1535 (1968), *amending*, Cal. Stats., 1953, ch. 151, § 1, at 939 (1953) (Codified at CAL. CIV. PRO. CODE § 21661 (West. 1965)).

³⁹ CAL. PUB. UTIL. CODE §§ 21661-66 (West. Supp. 1971).

a plan to reduce the noise at California airports to a tolerable level by 1985.⁴⁰

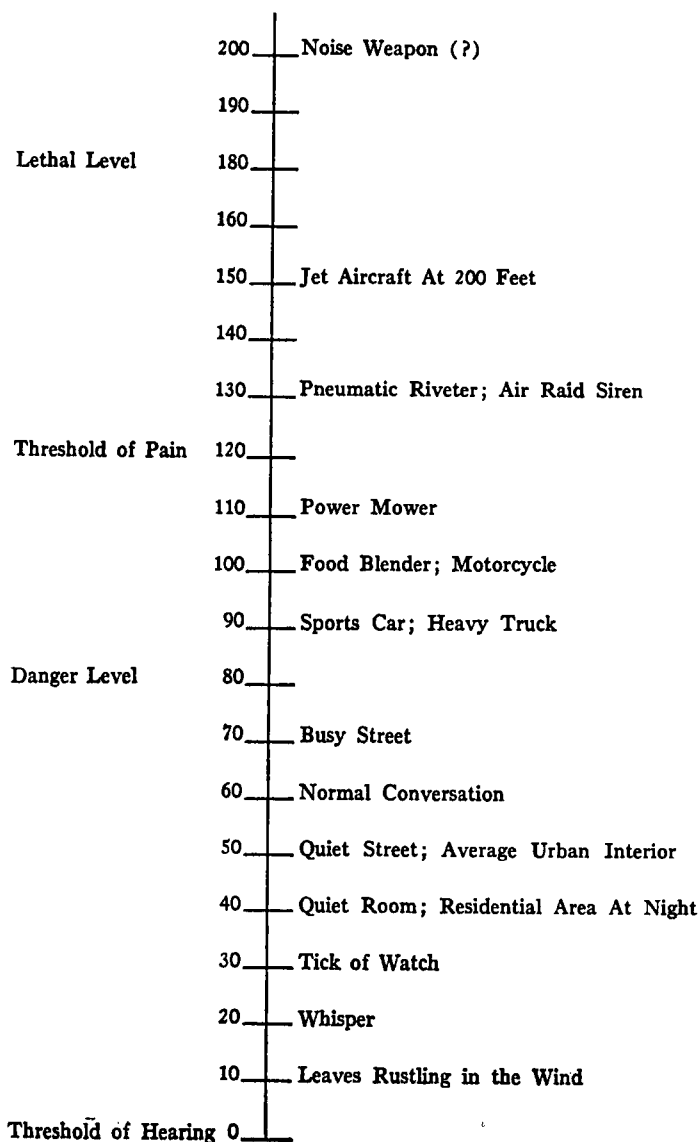
General Provisions

The methods outlined in the Regulations for measuring airport noise levels⁴¹ involve two basic types of measuring units—the

⁴⁰ Title 4, CAL. ADM. CODE §§ 5000-5080.5 (1970).

⁴¹ The scale to be used under the California Regulations for the measurement of noise levels is the decibel scale, a practical application of which is as follows: Hildebrand, *Noise Pollution: An Introduction to the Problem and An Outline for*

Various Sounds in Decibels



Hourly Noise Level⁴² (hereinafter referred to as HNL) measuring units⁴³ and the single event noise limit⁴⁴ units.⁴⁵ The former are designed to measure the noise level for all airport operations during each hour of the day⁴⁶ while the latter measure the noise of each aircraft as it takes off or lands.⁴⁷

The airport noise level criteria subject to measurement by HNL units are stated as follows:

Limitations on airport noise in residential communities are hereby established:

(a) The criterion community noise equivalent level⁴⁸ is 65 decibels for proposed new airports and for vacated military airports being converted to civilian use.

(b) Giving due consideration to economic and technological feasibility, the criterion community noise equivalent level for existing airports (except as follows) is 70 decibels until December 31, 1985, and 65 decibels thereafter.

(c) The criterion CNEL for airports which have 4-engine turbojet or

Future Legal Research, 70 COLUM. L. REV. 652, 670 (1970). For an extensive discussion of other types of scales usable see Berger, *Nobody Loves An Airport*, 43 S. CAL. L. REV. 631 (1970); Larsen, *Improving the Airport Environment: Effect of the 1969 FAA Regulations on Noise*, 55 IOWA L. REV. 808 (1970).

⁴² "The hourly noise level, in decibels, is the average (on an energy basis) noise level during a particular hour. Hourly noise level is determined by subtracting 35.6 decibels equal to $10 \log_{10} 3600$ from the noise exposure level measured during the particular hour, integrating for those periods during which the noise level exceeds a threshold noise level." Title 4, CAL. ADM. CODE § 5006(e) (1970).

⁴³ "The HNL monitoring system shall measure the hourly noise level and shall provide identification of the hour. This system shall be deployed as a community monitoring system. An HNL system consists of two subsystems: a noise level subsystem and an integrator/logger subsystem." *Id.* § 5080.1(d).

⁴⁴ "The single event noise exposure level, in decibels, is the noise exposure level of a single event, such as an aircraft flyby, measured over the time interval between the initial and final times for which the noise level of a single event exceeds the threshold noise level . . ." *Id.* § 5006(d).

⁴⁵ "The SENEL monitoring system shall measure single event noise exposure levels exceeding the maximum allowable single event noise exposure level and shall log the time of occurrence of each such event. An SENEL system consists of two subsystems: a noise level subsystem and an integrator/logger subsystem." *Id.* § 5080.1(c).

⁴⁶ *Id.* § 5080.1(d).

⁴⁷ *Id.* §§ 5035, 5080.1(c) (1970).

⁴⁸ The Community Noise Equivalent Level is the acoustic scale used by the DOA in setting the noise criteria. It takes into account all the elements that combine to form the total aircraft noise environment around an airport. These elements are the magnitude and duration of noise from each aircraft flyby, number of flybys, and time of occurrence. The Regulations define CNEL as follows:

"Community noise equivalent level, in decibels, represents the average daytime noise level during a twenty-four hour day, adjusted to an equivalent level to account for the lower tolerance of people to noise during evening and night time periods relative to the daytime period. Community noise equivalent level is calculated from hourly noise levels by the following:

$$\text{CNEL} = 10 \log \frac{1}{24} \left[\sum \text{antilog} \frac{\text{HNLD}}{10} + 3 \sum \text{antilog} \frac{\text{HNLE}}{10} + 10 \sum \text{antilog} \frac{\text{HNLN}}{10} \right]$$

Where

HNLD are the hourly noise levels for the period 0700-1900 hours;

turbofan air carrier aircraft operations and at least 25,000 annual air carrier operations (takeoffs plus landings) is as follows:

Date	CNEL (in dB)
Effective date of regulations ^{48a}	
to 12-31-75	80
1-1-76 to 12-31-80	75
1-1-81 to 12-31-85	70
1-1-86 and thereafter	65 ⁴⁹

These standards represent the average of all the hourly noise levels over each twenty-four hour period. If at the end of a twenty-four hour period any residential area is affected by an airport noise level above the criterion level, then the airport is in violation of the Regulations.

The timetable noted above allows an airport proprietor to progressively reduce the noise level at his airport so that it reaches the tolerable level of 65 decibels by 1985. The DOA considered 65 decibels as the ultimately desired noise level by determining, pursuant to its authority under the enabling legislation,⁵⁰ that this level is acceptable to the reasonable man living within the vicinity of an airport.⁵¹ Sixty-five decibels does appear to be a reasonable level as it is comparable to the sound produced by normal conversation.⁵² In deeming it the desired level, the DOA considered many factors. Two of the more important ones were the adverse effect of noisy airports on the living habits of persons in surrounding communities and the fact that many individuals and organized citizen groups have complained about airport noise.⁵³ Studies of these many and varied complaints indicated that the severity of each complaint was associated principally with a combination of the magnitude and duration of the noise from aircraft operations, the number of aircraft operations, and the time of occurrence.⁵⁴

Implementation

The Regulations are designed to achieve airport noise abatement through the efforts of the airport proprietor working in conjunction with local governments, local land use commissions, aircraft operators, pilots, and the DOA.⁵⁵ However, the airport

HNLE are the hourly noise levels for the period 1900-2200 hours;
HNLN are the hourly noise levels for the period 2200-0700 hours;
and Σ means summation." Title 4, CAL. ADM. CODE § 5006(f) (1970).

^{48a} The noise criteria under the regulations have been designated effective Dec. 1, 1972. Cal. Stats., 1971, ch. 1734, to be codified in *Cal. Pub. Util. Code* § 21669.3.

⁴⁹ *Id.* § 5012 (1970).

⁵⁰ CAL. PUB. UTIL. CODE § 21669 (West Supp. 1971).

⁵¹ Title 4, CAL. ADM. CODE § 5005 (1970).

⁵² See note 41, *supra*.

⁵³ Title 4, CAL. ADM. CODE § 5005 (1970).

⁵⁴ *Id.*

⁵⁵ *Id.* § 5000 (1970).

proprietor is ultimately responsible for complying with the noise level criteria.⁵⁶ In order to bring his airport within the required noise levels, the proprietor may do any or all of the following: 1) Encourage use of the airport by the least noisy aircraft and discourage its use by others; 2) Encourage the least noisy approach and departure flight paths; 3) Plan the least noisy runway utilization schedules; 4) Reduce flight frequency of the noisier aircraft during the most noise sensitive time periods; 5) Employ shielding through use of natural terrain, buildings, and other available devices; and 6) Develop compatible land use within the areas around the airport affected by noise levels greater than those allowable under the Regulations.⁵⁷

An additional method, which is not optional but must be implemented by the airport proprietor, is the selection of single event noise limits.⁵⁸ That is, the airport proprietor must select noise limits representing the maximum noise levels which aircraft landings and takeoffs may generate. The airport proprietor must select these limits from a range designated permissible by the DOA.⁵⁹ Upon approval by the DOA, the limits selected by the airport proprietor are enforceable by the county, and individual aircraft operators who violate them are subject to a \$1,000 fine per violation.⁶⁰ Thus, although the airport proprietor is responsible for bringing his airport within the ambient noise level criteria for all operations, the aircraft operators are responsible for complying with the takeoff and landing noise limits.

The provisions in the Regulations designed to establish monitoring programs became effective November 30, 1971.^{60a} Counties have six months from this date to determine whether a particular airport has a noise problem.⁶¹ In making this determination, the county must perform the following functions:

- (1) Investigate the possible existence of a noise impact area greater than zero based on a community noise equivalent level of 70 decibels,

⁵⁶ *Id.* §§ 5060-64.

⁵⁷ *Id.* § 5011. Concerning the constitutional validity of compatible land use zoning, see *Morse v. County of San Luis Obispo*, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967); and *Smith v. County of Santa Barbara*, 243 Cal. App. 2d 126, 52 Cal. Rptr. 292 (1966). Both of these courts found the development of compatible land use within the areas surrounding an airport to be a constitutionally valid objective of zoning. As to the constitutional validity of the other noise abatement methods, see notes 111-81 and accompanying text, *infra*.

⁵⁸ Title 4, CAL. ADM. CODE § 5035 (1970).

⁵⁹ *Id.*

⁶⁰ *Id.* § 5055, CAL. PUB. UTIL. CODE § 21669.4 (West Supp. 1971).

^{60a} Cal. Stats., 1971, ch. 1734, to be codified in *Cal. Pub. Util. Code* § 21669.3.

⁶¹ Title 4, CAL. ADM. CODE § 5070(a) (1970).

and determine whether or not people actually reside inside the noise impact boundary;⁶²

(2) Review other information that it may deem relevant, including but not limited to complaint history and legal actions brought about by aircraft noise; and

(3) Coordinate with, and give due consideration to the recommendations of, the county airport land use commission.⁶³

When a county makes its determination with respect to the existence of a noise problem at a particular airport, any interested or affected person⁶⁴ or any governmental agency disagreeing with the county's findings may file an appeal with the DOA.⁶⁵ The DOA must conduct its own investigation and report its conclusions to the parties involved.⁶⁶ If the parties disagree with these conclusions, they have ten days to demand a hearing from the DOA. The DOA must then conduct the necessary hearing pursuant to the California Administrative Procedure Act.⁶⁷ Following a final determination by the DOA that a particular airport is operating in violation of the Regulations, the proprietor must seek a temporary variance and initiate the proper noise monitoring procedures.⁶⁸ That is, both the variance procedure and the requirement for initiation of monitoring are delayed until the DOA reaches a conclusive determination as to whether a noise problem exists.⁶⁹

The airport proprietor, in initiating the monitoring, will place single event noise limit measuring units at each end of his airport's runways for the monitoring of noise levels for each aircraft takeoff and landing.⁷⁰ He will also locate HNL units around his airport for the measurement of the operational noise level of the airport. However, before doing the latter he must determine a noise impact boundary⁷¹ for his airport. This boundary will surround

⁶² This means that the county will check to see if any residences around the airport are actually affected by noise levels greater than 70 decibels. For a discussion of how noise impact boundaries and areas are designated *see* notes 71-74 and accompanying text, *infra*.

⁶³ Title 4, CAL. ADM. CODE § 5050(b) (1970).

⁶⁴ Just what the phrase "interested or affected persons" means is unclear. The fact that the phrase includes both the words "interested" and "affected" could mean that appeal is allowed not only by people living within the vicinity of the airport but also by people living outside the vicinity who are interested in protecting the environment from excessive noise. In any event it is clear that a person or group need not be both "interested" and "affected." For further discussion of this point *see* notes 108-10 and accompanying text, *infra*.

⁶⁵ Title 4, CAL. ADM. CODE § 5050(c) (1970).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* § 5070(b).

⁶⁹ Telephone interview with Richard Dyer, Program Manager for Noise Level Control, Cal. Dep't of Aeronautics, Aug. 15, 1971.

⁷⁰ Title 4, CAL. ADM. CODE § 5031 (1970).

⁷¹ *Id.* §§ 5020-25.

the area in the vicinity of an airport affected by airport noise levels greater than the criteria permit.⁷² The airport proprietor will be primarily concerned with residential areas⁷³ within the noise impact boundary. He must reduce his airport noise level to the extent where it no longer subjects residences to improper noise levels. Once a noise impact boundary is established, the HNL monitoring units will be located along its perimeter at a minimum of twelve equidistant points.⁷⁴

*The Variance Procedure*⁷⁵

An airport proprietor may request that his airport be allowed to temporarily violate the noise criteria.⁷⁶ In his application to the DOA, he must set forth reasons why a variance is necessary, the future date by which he expects to comply with the Regulations, and a schedule of noise level reductions for the intervening time.⁷⁷

The DOA may grant a variance if the public interest would be satisfied by so doing.⁷⁸ In making this decision the DOA must weigh certain factors including the following: 1) the economic and technological feasibility of complying with the Regulations; 2) the noise impact should the variance be granted; 3) the value to the public of the services for which the variance is sought; and 4) whether the airport proprietor is making a *bona fide* effort to comply with the Regulations.⁷⁹ The DOA, after balancing these factors, will grant a variance only if such action would be consistent with the general welfare of the community wherein the airport is located.

Although the above facts indicate that the DOA has a tremendous amount of discretion in determining whether it will grant a variance, the latitude of its discretion is no wider than that of other

⁷² *Id.* § 5006(h).

⁷³ *Id.* § 5014(h). This provision indicates that residential areas will be determined by the actual use to which the land is put, not by the classification for which the land is zoned.

⁷⁴ *Id.* § 5021.

⁷⁵ *Id.* § 5075.

⁷⁶ "The variance procedure under the California Regulations states that an airport proprietor may not request a variance from the requirements of the noise criteria. This means that an airport proprietor may not request that the noise criteria be changed for his airport. However, it does not mean that an airport proprietor cannot request that his airport be allowed to temporarily violate the criteria. An airport proprietor may request to operate his airport above the criterion levels temporarily if he shows sufficient hardship as required by the variance procedure." Telephone interview with Richard Dyer, Program Manager for Noise Level Control, Cal. Dep't Aeronautics, Aug. 15, 1971.

⁷⁷ Title 4, CAL. ADM. CODE § 5075(b)(3) (1970).

⁷⁸ *Id.* § 5075(b)(4).

⁷⁹ *Id.*

administrative agencies. An example of such an agency is a zoning board whose duty it is to determine the land uses which are the most advantageous to the community and grant variances only when consistent with the general welfare of the community.⁸⁰ As is the case with zoning boards, the DOA could possibly be subject to suit if the variance were granted over objections strenuous enough to require its denial. By granting a variance in this situation, the action of the DOA would be very similar to a zoning board's action in arbitrarily granting a variance without giving sufficient consideration to the general welfare of the community. Such action by zoning boards has traditionally been invalidated by the courts.⁸¹ Therefore, if the DOA acts without giving sufficient consideration to a community's welfare, it is reasonable to expect that its action may be invalidated.⁸²

Assuming the DOA deems a person interested or affected, to what extent may he become involved in the variance procedure? According to the Regulations, "On its own motion, or upon the request of an affected or interested person, the department shall hold a public hearing in connection with the approval of an application for a variance. Any interested person may obtain from the department information on pending requests for variances at any time."⁸³ Thus, the type of hearing available to interested persons under the variance procedure is merely a "public hearing" at which they would be given a reasonable opportunity to be heard. This is not the same as the formal hearing pursuant to the California Administrative Procedure Act⁸⁴ which is available to interested persons

⁸⁰ *Essick v. Los Angeles*, 34 Cal. 2d 614, 213 P.2d 492 (1950); *Minney v. Ayusa*, 164 Cal. App. 2d 12, 330 P.2d 255 (1958), *appeal dismissed*, 359 U.S. 436 (1959); *L & M Investment Co. v. Cutler*, 125 Ohio St. 12, 180 N.E. 379 (1932).

⁸¹ *Moriarty v. Pozner*, 21 N.J. 199, 121 A.2d 527 (1956); *Ranney v. Instituto Pontificio Delle Maestre Filippini*, 20 N.J. 189, 119 A.2d 142 (1955).

⁸² Concerning what type of interest one must possess to obtain standing to sue on an environmental issue, the U.S. Supreme Court in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 154 (1970), declared:

That interest, at times, may reflect "aesthetic, conservational, and recreational" as well as economic values. [Citations omitted]. We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners rely here.

However, the 9th Circuit believes that standing may be won only upon a showing of sufficient actual economic interest. *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970), *cert. granted*, 401 U.S. 907 (1971) *sub. nom.* *Sierra Club v. Morton*. The Supreme Court granted certiorari in this case to resolve the issue of standing to sue in cases involving the environment. For a thorough analysis of this standing issue see Comment, *Standing and Sovereign Immunity: Hurdles for Environmental Litigants*, 12 SANTA CLARA LAWYER 122 (1971).

⁸³ Title 4, CAL. ADM. CODE § 5075(b)(6) (1970).

⁸⁴ CAL. GOV'T CODE §§ 11370 *et seq.* (West 1966).

appealing a county's determination as to the existence of a noise problem at an airport.⁸⁵

Enforcement

The fact that the Regulations require that by 1985 no residence be affected by an airport noise level greater than the level of normal conversation, 65 decibels, indicates the potential strength of the Regulations. Nevertheless, the Regulations would be useless in the absence of effective enforcement. Presently, there are two methods of enforcement specified in the Regulations. Individual violators of the single event noise limits may be fined up to \$1,000 per violation.⁸⁶ This would undoubtedly deter aircraft operators from future violations of the single event limits. The operational noise criteria, on the other hand, are not supported by an equally effective enforcement technique. The only method available for enforcement of the noise criteria is for the DOA to lift the license of an airport found in violation of the criteria.⁸⁷ This technique presents practical as well as constitutional problems which are discussed in the following sections.⁸⁸

Summary

The California Regulations represent a strong effort to regulate airport noise, and this is something that neither inverse condemnation nor nuisance suits have been able to accomplish. However, before a conclusion may be reached as to the potential effectiveness of the Regulations, there are certain practical difficulties and constitutional issues which must be resolved.

PRACTICAL DIFFICULTIES AND SUGGESTED SOLUTIONS

The Regulations Prohibit Use of Noise Criteria in Civil Litigation

One problem concerns the provision in the Regulations which proscribes application of the noise criteria in civil litigation arising out of airport noise:

The Regulations established by this subchapter are not intended to set noise levels applicable in litigation arising out of claims for damages occasioned by noise. Nothing herein contained in these regulations

⁸⁵ *Id.* § 5050(c).

⁸⁶ CAL. PUB. UTIL. CODE § 21669.4 (West Supp. 1971).

⁸⁷ CAL. PUB. UTIL. CODE § 21668 (West Supp. 1971).

⁸⁸ See notes 97-107, 171-76 and accompanying text, *infra*.

shall be construed to prescribe a duty of care in favor of, or to create any evidentiary presumption for use by, any person or entity other than the State of California, the counties and airport proprietors in the enforcement of the regulations.⁸⁹

This provision is designed to protect airports and airlines from inverse condemnation and nuisance suits by individuals claiming their properties have been damaged by airport noise levels greater than those allowable under the Regulations. Courts handling such suits are required to take judicial notice of the proscription if the regulation is valid.⁹⁰ However, it is clear that this regulation is invalid under California Government Code Section 11374. This section provides that any state agency regulations adopted to implement the provisions of a statute will be found invalid where they are not "reasonably necessary to effectuate the purpose of the statute."⁹¹ The California Regulations were adopted by the DOA to implement the directive in California Public Utilities Code Section 21669 to establish standards for control of aircraft and airport noise.⁹² There is little doubt that the proscription is not necessary to achieve this purpose since it in no way relates to aircraft and airport noise abatement standards. Therefore, courts are required to invalidate this regulation.⁹³

Assuming the invalidity of the proscription, the desirability of using the noise criteria in civil litigation must be determined. Initially, it must be noted that if the Regulations are implemented on schedule, by 1985 no residence in California will be affected by airport noise levels greater than the level of normal conversation. Clearly, this event would extinguish any further necessity for inverse condemnation or nuisance actions over airport noise. Airport noise would no longer cause "takings" of property by substantially interfering with the property so as to diminish the property's fair market value; nor would airport noise render airport operations "unnecessary and injurious" and thereby en-

⁸⁹ Title 4, CAL. ADM. CODE § 5004 (1970).

⁹⁰ CAL. GOV'T CODE § 11384 (West 1966).

⁹¹ "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute. . . ." CAL. GOV'T CODE § 11374 (West 1953).

⁹² CAL. PUB. UTIL. CODE § 21669 (West Supp. 1971); Title 4, CAL. ADM. CODE § 5000 (1970).

⁹³ *Macomber v. State Social Welfare Bd.*, 175 Cal. App. 2d 614, 346 P.2d 808 (1959). The court here found that if, in adopting an administrative regulation under the authority of an enabling statute, a state agency does not confine itself to a reasonable interpretation of the statute, the legislative area has been invaded and courts are obligated to strike down an administrative regulation which attempts to add or subtract from the statute.

joinable as a nuisance.⁹⁴ Until that day is reached, though, what role can the Regulations' noise criteria play in civil litigation over airport noise?

Unquestionably it would be desirable to have absolute standards for determining when interference from airport noise becomes so great as to cause a "taking" or create a nuisance. This would preclude the necessity of courts having to consider the facts of each case separately in order to determine whether a "taking" or a nuisance exists. However, if the noise criteria were established as guideposts for courts to use in making their determinations, courts would be developing new rules of law irreconcilable with present rules. An example will serve to illustrate this inevitable conflict. In 1985, the criterion noise level under the Regulations is 65 decibels, the level of normal conversation. If an inverse condemnation action were brought in 1985 in a court using the noise criteria as its rule, the court would find a "taking" if the property were affected by airport noise greater than 65 decibels. However, if the action were brought in a court using the reduction in fair market value rule, it is uncertain that the court will find a "taking" on the same facts. In other words, merely because airport noise levels exceed the level of normal conversation does not mean that they will reduce the fair market value of property. Similarly, in nuisance suits, merely because the noise from airport operations exceeds the Regulations' noise criteria does not mean that those operations are "unnecessary and injurious."

Thus, the Regulations' noise criteria should not be absolute standards to apply in inverse condemnation or nuisance suits. Although the DOA exceeded its authority in precluding use of the noise criteria in civil litigation, courts should follow its approach.

Enforcement

A second problem, and indeed a major one, concerns the enforcement of the Regulations. The single event noise limits for takeoffs and landings are to be enforced by levying a \$1,000 fine against individual aircraft operators each time they violate a takeoff or landing noise limit.⁹⁵ The fine is both practical and effective. Individual aircraft operators who violate the limits may be detected with little difficulty for each takeoff and landing at a noise-problem

⁹⁴ See notes 9-39 and accompanying text, *supra*.

⁹⁵ CAL. PUB. UTIL. CODE § 21669.4 (West Supp. 1971); Title 4, CAL. ADM. CODE § 5055 (1970). The latter provision states that prosecution will proceed under the former provision.

airport will be monitored.⁹⁶ Furthermore, the fine will discourage future violations.

While a fine for violations of the single event noise limits may be effective, the method available to the DOA for enforcing the operational noise level criteria is highly impractical. This method consists of lifting the license of an airport violating the noise criteria.⁹⁷ Independent of the constitutional problems which might exist,⁹⁸ lifting the license of any large California airport is not practical.⁹⁹ Consequently, if the Regulations' operational noise criteria are to be an effective means of airport noise abatement control, provisions for their enforcement must be specifically defined and made practical to implement.

Amending the Regulations by inserting provisions similar to the enforcement sections in the California Water Quality Control Act¹⁰⁰ provides a possible solution to the problem. This legislation provides for certain regulations to prevent the pollution of California's waters by industry, cities, counties, governmental agencies, or anyone else.¹⁰¹ If these regulations are violated, the violator is issued a cease and desist order¹⁰² and a cleanup and abatement order.¹⁰³ Upon failure to comply with either order, the superior court of the county wherein the violator is located may issue a preliminary or permanent injunction restraining the violator from continuing the discharge in violation of the order.¹⁰⁴ Furthermore, upon failure to comply with a cleanup and abatement order, the responsible governmental agency must abate the discharge and hold the violator liable for the cost of the cleanup operation.¹⁰⁵ In addition, violation of a cease and desist order subjects the violator to a fine of up to \$6,000 for each day in which such violation occurs.¹⁰⁶ These enforcement techniques have been effectively employed to achieve compliance with the Water Quality Regulations.¹⁰⁷

⁹⁶ Title 4, CAL. ADM. CODE § 5030 (1970).

⁹⁷ CAL. PUB. UTIL. CODE § 21668 (West Supp. 1971).

⁹⁸ See notes 171-76 and accompanying text, *infra*.

⁹⁹ Telephone Interview with Sid McCausland, Consultant to the Committee on Environmental Quality, California Assembly, Aug. 5, 1971.

¹⁰⁰ CAL. WATER CODE §§ 13020 *et seq.* (West 1971).

¹⁰¹ *Id.*

¹⁰² *Id.* § 13301.

¹⁰³ *Id.* § 13304(a).

¹⁰⁴ *Id.* §§ 13304(a), 13331.

¹⁰⁵ *Id.* § 13304(b).

¹⁰⁶ *Id.* § 13350(a).

¹⁰⁷ "The case in which these regulations have been most effectively employed to date concerned United States Steel as the polluter. After the issuance of a cease and desist order and U.S. Steel's failure to comply therewith, the case was referred to the California Attorney General's office for prosecution under the injunction and fine provisions of the regulations. Prior to suit, U.S. Steel cleaned up their operation to

The Water Quality Regulations and the California Noise Regulations are similar in that they both seek to protect the environment from pollutants. Therefore, it is reasonable to urge that legislation such as the water enforcement provisions be implemented to enforce the airport noise regulations. The new sections should provide for issuance of a noise abatement order by a county or the DOA when an airport is found to be violating the operational noise criteria. This order should require the airport proprietor to make the necessary adjustments so that his airport may comply with the Regulations. An affirmative injunction should also be available to require an airport proprietor to comply with the abatement order. If the airport proprietor fails to comply, the county within which the airport is located should be required to take action to bring the airport within the required noise levels with costs being charged to the violator, the airport proprietor. Finally, an airport proprietor should be subject to a fine of up to \$6,000 for each day he fails to take action pursuant to a noise abatement order. The following provisions incorporate all of these suggestions:

(a) Upon failure of any airport proprietor to comply with any noise abatement order issued by a county or the DOA, the Attorney General, upon request of the county or DOA, shall petition the superior court of the county wherein the airport is located for the issuance of an affirmative injunction requiring such proprietor to take available action to prevent continued violation of the noise abatement order;

(b) Upon an airport proprietor's failure to take available action to comply with a noise abatement order within a reasonable time, the county within which the airport is located shall take the necessary action and, by so doing, will acquire a lien on the airport property payable by the airport proprietor, for the reasonable costs actually incurred in abating the noise;

(c) In addition, any airport proprietor who intentionally or negligently violates a noise abatement order may be civilly liable for a sum not to exceed six thousand dollars (\$6,000) for each day in which such violation occurs;

(d) The Attorney General, upon request of the county wherein the airport is located or the DOA, shall petition the superior court to impose, assess, and recover such sums. In determining such amount, the court shall take into consideration all relevant circumstances including the extent of harm caused by the violation, the length of time over which the violation occurs and corrective action, if any, taken by the airport proprietor.

meet the requirements of the regulations and settled out-of-court for \$15,000 due to their failure to comply with the cease and desist order until 15 days had elapsed. In addition to this case there are several others in which prosecutions by the California Attorney General are presently pending." Telephone interview with Bill Gingridge, Information Officer for the Regional Water Quality Control Board, Oakland, California, Oct. 11, 1971.

If adopted, these suggested provisions would provide the practical means by which compliance with the operational noise level criteria could be achieved. The affirmative injunction would prevent the airport proprietor from violating the noise criteria by requiring him to take available steps under the Regulations to bring his airport into compliance. Furthermore, the fine would deter airport proprietors from violating the criteria. Finally and most importantly, the requirement that the county abate the excessive noise should the airport proprietor fail to act assures attainment of the noise criteria.

Interested or Affected Persons

The final difficulty to be discussed deals with the lack of a definition of "interested or affected persons" for purposes of filing for a hearing under the appeals or variance procedures of the Regulations. It is apparent that a person does not have to meet the legal requirements of standing in order to file for an administrative hearing and that it is within the discretion of the agency granting the hearing to determine who is an "interested or affected person."¹⁰⁸ However, at the present time, the DOA has no set criteria for determining who is sufficiently interested to file for or request a hearing under either the appeals or variance procedures. The DOA has merely stated that it would question an application for a hearing by persons not directly affected by the noise level of a particular airport, such as a citizen action group interested in protecting the environment from noise pollution.¹⁰⁹ In order to fill this void, the DOA should revise the Regulations to provide a clear and concise definition for "interested or affected persons." The following is illustrative of such a definition:

Interested or affected persons, for purposes of these regulations, shall include 1) all persons whose constitutional, statutory, or common law rights would be adversely affected by DOA action, and 2) public action groups which have established their interest in protecting the public from governmental action which is detrimental to the environment.

This definition would preclude persons whose only desire is to slow down or thwart agency action from becoming involved in the appeals or variance procedures. However, it would allow environmental protection groups to question agency action where these groups have established their concern for environmental protection. The DOA

¹⁰⁸ Telephone interview with Dan Weston, Deputy Attorney General, State of California, Aug. 11, 1971.

¹⁰⁹ Telephone interview with Kieffer Parker, Deputy Director, Cal. Dep't of Aeronautics, Aug. 3, 1971.

should consider the requisite interest established when a group proves that it is solely concerned with protecting the environment and that it has expended, or is presently expending, large amounts of time, money, and effort in pursuing environmental protection activity.¹¹⁰

Summary

Proscribing the application of the noise criteria in civil litigation arising out of airport noise exceeds the DOA's authority under the enabling legislation.¹¹¹ Therefore, this provision should be deleted from the Regulations. Additionally, existing enforcement methods are impractical and should be replaced by the techniques used to enforce the California Water Quality Control Act.¹¹² Finally, the phrase "interested or affected persons" should be specifically defined in the above-suggested manner so that it is clear who may become involved in the appeals and variance procedures.

CONSTITUTIONAL ISSUES RELATED TO THE REGULATIONS

While the substantive infirmities may be remedied by the various proposals discussed, the Regulations are still subject to attack on constitutional grounds. The Commerce Clause of the United States Constitution vests Congress with the power to regulate interstate and foreign commerce.¹¹³ The constitutional issues relating to the California Regulations concern whether the Regulations are pre-empted by federal law regulating interstate flight and whether the Regulations unduly burden interstate commerce.

A. Federal Pre-emption

Generally, states may act on a subject: 1) if it is one of local interest and concern and in an area not requiring national uniformity;¹¹⁴ 2) if Congress has not acted regarding it;¹¹⁵ or 3) if

¹¹⁰ The court in *Citizens Committee v. Volpe*, 425 F.2d 97 (2d Cir. 1970), *cert. denied*, 400 U.S. 949 (1970), found such an interest sufficient to merit standing to sue. Thus, if it is sufficient to obtain standing to sue, it is certainly sufficient to become involved in the appeals or variance procedures of the California Regulations. The court granted standing to an ad hoc environmental protection group, because it had displayed a sufficient interest in protecting the environment as evidenced by the considerable expense and effort undertaken by the group to protect the environment. 425 F.2d at 103. For an in-depth look at the problem of establishing a sufficient interest for standing purposes see Comment, *Standing and Sovereign Immunity: Hurdles for Environmental Litigants*, 12 SANTA CLARA LAWYER 122 (1971).

¹¹¹ See notes 89-93 and accompanying text, *supra*.

¹¹² CAL. WATER CODE §§ 13020 *et seq.*, 13301, 13304, 13331, 13350 (West 1971).

¹¹³ U.S. CONST. art. I, § 8, cl. 3.

¹¹⁴ *Morgan v. Virginia*, 328 U.S. 373, 386 (1946).

Congress has acted but has not obtained exclusive jurisdiction over the field,¹¹⁶ provided the state law would not conflict with the federal law.¹¹⁷

1. *Local Interest Absent Need for National Uniformity*

The California Regulations were adopted with the valid interest and intent of protecting community peace and property rights by protecting California communities from excessive airport noise.¹¹⁸ In addition, there has been no indication by Congress or the courts that airport noise regulation is a subject requiring national uniformity. Therefore, the California Regulations cannot be pre-empted on this ground. However, the fact that Congress has acted in the fields of aircraft flight and noise control necessitates examination of the extent of such action to determine whether the California Regulations conflict with federal law or whether they deal in an area of exclusive federal jurisdiction.

2. *Congressional Action in the Field of Airport Noise Regulation*

The federal laws relating to airport noise which are pertinent to this discussion¹¹⁹ are the Federal Aviation Act of 1958¹²⁰ and its 1968 noise amendment.¹²¹ The 1958 Act was enacted for the purpose of providing safety factors for interstate flight. Pursuant to the Act, specific regulations were adopted which govern the following: designation of federal airways,¹²² establishment of jet routes,¹²³ objects affecting navigable airspace,¹²⁴ general operating and flight rules which include minimum safe altitudes and operations at airports,¹²⁵

¹¹⁵ California v. Thompson, 313 U.S. 109, 113 (1941).

¹¹⁶ California v. Zook, 336 U.S. 725, 728-31 (1949).

¹¹⁷ Kelley v. Washington, 302 U.S. 1, 10 (1937).

¹¹⁸ Title 4, CAL. ADM. CODE § 5000 (1970); see note 69, *supra*.

¹¹⁹ There is one federal law not discussed in the text because it relates only indirectly to the issues discussed therein. This federal law is the *Airport and Airway Development Act* §§ 11-27, 49 U.S.C.A. §§ 1711-27 (Supp. 1970), which governs the expansion of airports when such expansion is funded entirely or partially by federal funds. The act states that before expansion will be approved, environmental studies of the expansion must be performed. According to the Federal Aviation Agency's interpretation (FAA Order No. 5050.2), prior to approval sponsors of the expansion must perform environmental impact studies and submit an impact statement pursuant to the requirements of the *National Environmental Policy Act* §§ 2 *et seq.* 42 U.S.C.A. §§ 4321 *et seq.* (Supp. 1971), whenever such expansion is likely to be highly controversial on environmental grounds because it is likely to noticeably affect the ambient noise level for a significant number of people.

¹²⁰ 49 U.S.C.A. §§ 1301 *et seq.* (1963).

¹²¹ 49 U.S.C.A. § 1431(a) (Supp. 1971).

¹²² 14 C.F.R. §§ 71.1-.19 (1971).

¹²³ 14 C.F.R. §§ 75.1-.17 (1971).

¹²⁴ 14 C.F.R. §§ 77.1-.75 (1971).

¹²⁵ 14 C.F.R. §§ 91.1-.175 (1971).

special air traffic rules and airport traffic patterns for certain specified airports,¹²⁶ instrument flight rule altitudes,¹²⁷ and standard instrument approach procedures.¹²⁸ These regulations were not intended to establish controls of airport noise levels and only indirectly affect such levels by controlling the altitudes at which aircraft land and take off.

The 1968 noise amendment deals with aircraft noise control. This amendment directs the administrator of the Federal Aviation Administration to prescribe and amend rules and regulations "to provide for the control and abatement of aircraft noise and sonic boom."¹²⁹ Pursuant to this directive, the Federal Aviation Agency added noise standards for aircraft certification to the Federal Aviation Regulations.¹³⁰ These are not standards for the control of operational noise levels at airports, but are requirements which all new jet aircraft must meet before they will be licensed to fly in interstate commerce.¹³¹

Given the extent of federal regulation in the field of airport noise control, the question becomes: Has the federal government acquired exclusive jurisdiction over the field, and if not, do the California Regulations conflict with federal law?

3. *Absent Conflict, Federal Law Must Possess Exclusive Jurisdiction to Pre-empt State Law*

It is clear that states and localities, in their legislative capacities, may not pass legislation in direct conflict with federal Regulations.¹³² The California Regulations create no conflict with federal law for the Regulations specifically prohibit such an occurrence.¹³³ Therefore, the discussion must proceed with an analysis of federal jurisdiction over airport noise regulation.

The federal noise legislation of 1968 and the standards adopted pursuant thereto deal with aircraft noise and were not intended to pre-empt the field of airport noise regulation. This federal legislation specifically exempts airport proprietors from federal jurisdiction.¹³⁴

¹²⁶ 14 C.F.R. §§ 93.1-133 (1971).

¹²⁷ 14 C.F.R. §§ 95.1-.8001 (1971).

¹²⁸ 14 C.F.R. §§ 97.1-.20 (1971).

¹²⁹ 49 U.S.C.A. § 1431(a) (Supp. 1971).

¹³⁰ 14 C.F.R. §§ 36.1-1581 (1971) (appendix C).

¹³¹ For a discussion of the ineffectiveness of the federal noise standards for type-certification see Berger, *Nobody Loves An Airport*, 43 S. CAL. L. REV. 631, 763-774 (1970); Larsen, *Improving The Airport Environment: Effect of the 1969 FAA Regulations on Noise*, 55 IOWA L. REV. 808 (1970).

¹³² American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969).

¹³³ Title 4, CAL. ADM. CODE § 5004 (1970).

¹³⁴ See notes 135-37 and accompanying text, *infra*.

a. *The Power of An Airport Proprietor to Act Independently of Federal Noise Law.* As the owner of an airport, the proprietor has the right to regulate in the area of airport noise abatement independently of federal noise standards dealing with aircraft-type certification.¹³⁵ The Senate, in passing the 1968 noise amendment which authorized the noise standards for type certification, clarified the basis of this exception:

However, the proposed legislation will not affect the rights of a State or local public agency, as proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airport to aircraft on the basis of noise considerations so long as such exclusion is non-discriminatory In dealing with this issue, the Federal Government should not substitute its judgement for that of the States or elements of local government who, for the most part, own and operate our Nation's airports.¹³⁶

Furthermore, in adopting the noise standards for type certification pursuant to the mandate under the 1968 amendment, the Federal Aviation Agency also noted that the noise standards were not meant to inhibit the power of the airport proprietor to regulate in the area of noise abatement.¹³⁷

The DOA recognized that this caveat allows airport proprietors to regulate independently of federal law in the area of airport noise control and that there is no federal or state law prohibiting a state agency from issuing noise regulations directed at airport proprietors.¹³⁸ Cognizant of this, the DOA, acting in its capacity as the

¹³⁵ See *Griggs v. Allegheny County*, 369 U.S. 84 (1962), where a county, as proprietor of an airport, was held liable for an unconstitutional "taking" of property resulting from interference with the property by airport operations. Recognizing that this case established the responsibility of the airport proprietor to take whatever action necessary to prevent "takings" of property by his airport, the federal government has specifically not pre-empted the field of airport noise regulation by airport proprietors. S. REP. No. 1353, 90th Cong., 2d Sess. 2694 (1968).

¹³⁶ S. REP. No. 1353, 90th Cong., 2d Sess. 2694 (1968).

¹³⁷ "The noise limits specified in Part 36 are the technologically practicable and economically reasonable limits of airport noise reduction technology at the time of type certification and are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce. This limitation on the scope of Part 36 is required for consistency with the responsibilities placed upon the airport proprietor by the U.S. Supreme Court in *Griggs v. Allegheny County*, 369 U.S. 84 (1962). Consistent with this limited scope, this amendment specifies that the Federal Aviation Administration makes no determination, under Part 36, on the acceptability of the prescribed noise levels in any specific airport environment" 34 Fed. Reg. 18355-56 (1969). See also 14 C.F.R. § 36.201 (1971).

¹³⁸ In fact, the Massachusetts Supreme Judicial Court recently indicated that state legislation, requiring airport proprietors to exercise their power of noise control,

licensing agency for all California airports,¹³⁹ adopted the Regulations which direct airport proprietors to set maximum noise levels allowable for aircraft landings and takeoffs,¹⁴⁰ and to employ a series of other methods to bring the operational noise level of their airports within the required level.¹⁴¹ Courts have considered various methods used by different airports to achieve noise abatement.¹⁴² Most of these methods are specified in or contemplated by the California Regulations. The following have been validated by the courts as being within an airport's power to regulate independently of federal noise legislation: 1) Utilizing runways to achieve maximum noise abatement;¹⁴³ 2) Employing shielding through use of sound baffling devices¹⁴⁴ or portable shields;¹⁴⁵ 3) Reducing flight frequency during the most noise sensitive time periods;¹⁴⁶ and 4) Encouraging aircraft operators to use noise suppression devices on their engines.¹⁴⁷ The last approved method is not specified in the Regulations as being available to the airport proprietor. Nevertheless, in preparing such a list, the DOA stated that the available methods included but were not limited to the ones enumerated.¹⁴⁸ Thus, it is conceivable that airport proprietors could encourage the use of noise suppression devices in addition to utilizing the specified methods. The fact that the noise criteria under the Regulations are meant to gov-

should be validated. Advisory Opinion on Senate Bill No. 1161, 40 U.S.L.W. 2029 (Mass. Sup. Jud. Ct. June 25, 1971). The court made this suggestion in an advisory opinion addressed to the Massachusetts Legislature regarding the validity of a proposed Massachusetts law designed to regulate sonic boom at all Massachusetts airports. The Court found that the legislation exceeded the area which could still be subject to state regulation because the bill was not directed to the airport proprietors' powers over airport noise control. The California Regulations, to the contrary, are explicit in directing themselves to individual airport proprietors.

¹³⁹ CAL. PUB. UTIL. CODE § 21662 (West Supp. 1971).

¹⁴⁰ Title 4, CAL. ADM. CODE § 5035 (1970); *see also* CAL. PUB. UTIL. CODE § 21669 (West Supp. 1971).

¹⁴¹ Title 4, CAL. ADM. CODE § 5011 (1970).

¹⁴² Port of New York Authority v. Eastern Airlines, Inc., 259 F. Supp. 745 (E.D.N.Y. 1966); Township of Hanover v. Town of Morristown, 108 N.J. Super. 461, 261 A.2d 692 (1969).

¹⁴³ Port of New York Authority v. Eastern Airlines, Inc., 259 F. Supp. 745, 751-52 (E.D.N.Y. 1966).

¹⁴⁴ . . . "g) There shall also be required noise suppression devices and noise attenuation equipment or engine 'test cells' to be installed and used for jet engine maintenance and testing, or in the alternative, the construction and use of facilities acoustically designed for noise attenuation . . . to muffle ground run-up noise during repair and maintenance; . . . 1) Portable shields or sound baffling devices [are required at the end of runways]; j) Jet aircraft will be prohibited from take-off or landing except during specified hours, unless an emergency exists" Township of Hanover v. Town of Morristown, 108 N.J. Super. 461, 477, 261 A.2d 692, 708 (1969).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Title 4, CAL. ADM. CODE § 5011 (1970).

ern the "operation of aircraft and aircraft engines"¹⁴⁹ at California airports makes this not only conceivable but probable.

In addition to the approved methods mentioned above, the Regulations provide that the airport proprietor may encourage approach and departure flight paths and procedures to minimize the noise in residential areas¹⁵⁰ and set noise limits for aircraft landings and takeoffs.¹⁵¹ Unlike the methods of noise abatement enumerated above, these two additional methods have, to date, not been considered by the courts. These methods deal with flight path control for noise abatement purposes and, therefore, should be valid only if federal regulation of flight does not possess exclusive jurisdiction over this field.

b. *The Power of an Airport Proprietor to Act Independently of Federal Flight Path Regulation.* Congress has not explicitly excepted the airport proprietor from federal jurisdiction over flight paths. Therefore, if he has any power in this field, it must be derived from the cases which have considered the authority of states or localities to regulate flight for noise abatement purposes.

In *Allegheny Airlines v. Village of Cedarhurst*,¹⁵² the United States Court of Appeal for the Second Circuit held that a local ordinance, prescribing a minimum altitude of 1000 feet for flights over the locality, was unconstitutional on the grounds that the federal government had pre-empted the field of aircraft flight regulation.¹⁵³ However, the local ordinance considered by the court in *Cedarhurst* was in actual conflict with federal statutes and regulation.¹⁵⁴ Consequently, the Supreme Court of California in *Loma Portal Civic Club v. American Airlines, Inc.*,¹⁵⁵ concluded that the pre-emption language used in *Cedarhurst* should not be conclusive as to the validity of state regulation of flight for noise abatement purposes where the regulation does not conflict with federal flight rules.¹⁵⁶ In *Loma Portal*, the plaintiffs sought to enjoin a public airport's operations on the basis of noise considerations.¹⁵⁷ Defendants urged that an injunction should be refused since federal law pre-empts all aspects of flight operation.¹⁵⁸ In denying this contention, the California Supreme Court held that state legislation could

¹⁴⁹ *Id.* § 5000.

¹⁵⁰ *Id.* § 5011.

¹⁵¹ *Id.* § 5035.

¹⁵² 238 F.2d 812 (2d Cir. 1956).

¹⁵³ *Id.* at 815.

¹⁵⁴ *Id.* at 814.

¹⁵⁵ 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964).

¹⁵⁶ *Id.* at 590-93, 394 P.2d at 554-55, 39 Cal. Rptr. at 714-15.

¹⁵⁷ *Id.* at 585-86, 394 P.2d at 550-57, 39 Cal. Rptr. at 710-11.

¹⁵⁸ *Id.* at 591, 394 P.2d at 554, 39 Cal. Rptr. at 714.

not be pre-empted by federal law in the absence of a clear holding by the U.S. Supreme Court or Congress that federal jurisdiction had been made exclusive.¹⁵⁹ There is no U.S. Supreme Court case holding that the Federal Aviation Act of 1958 is to be the exclusive law dealing with the regulation of aircraft flight for noise abatement purposes. On the contrary, the *Loma Portal* court noted that the Federal Aviation Act of 1958, by its own terms, was not intended to be exclusive: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."¹⁶⁰

In support of this position, the court cited a U.S. Supreme Court case, *Huron Portland Cement Co. v. City of Detroit*.¹⁶¹ The Court upheld a city's application of its antismoke ordinance to a ship in international commerce although the vessel's boiler was built in compliance with federal requirements and had received federal approval after inspection.¹⁶² It was held that exclusive federal jurisdiction did not automatically follow from the fact that the ship was licensed under federal law.¹⁶³ Following this exact reasoning, the court in *Township of Hanover v. Town of Morristown*¹⁶⁴ reached the following conclusion regarding the exclusiveness of federal law in the area of airport noise regulation:

[T]he fact that planes are licensed and operating within a zone defined by Congress as "navigable airspace" should not immunize them from [noise] regulations evincing a valid local interest in maintaining community peace or protecting property rights.¹⁶⁵

Nevertheless, a federal district court in *Lockheed Air Terminal, Inc. v. City of Burbank*,¹⁶⁶ recently held, consistent with the holding in *Cedarhurst*, that the United States possesses exclusive jurisdiction in the field of aircraft flight regulation for noise abatement purposes and that federal law pre-empt this field.¹⁶⁷ This court, however, failed to distinguish the contrary holdings of the courts in *Loma Portal* and *Morristown*. Furthermore, the evidence¹⁶⁸ presented in support of the position of the *Burbank* court is weak. This evidence

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 592-93, 394 P.2d at 555, 39 Cal. Rptr. at 715. See also 49 U.S.C. § 1506 (1959).

¹⁶¹ 362 U.S. 440 (1960).

¹⁶² *Id.*

¹⁶³ *Id.* at 448.

¹⁶⁴ 108 N.J. Super. 461, 261 A.2d 692 (1969).

¹⁶⁵ *Id.* at 470, 261 A.2d at 701.

¹⁶⁶ 318 F. Supp. 914 (C.D. Cal. 1970).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 925.

consisted of a Senate Report which had stated that courts had held the Federal Government presently pre-empted the field of noise regulation in so far as it involved controlling the flight of aircraft.¹⁶⁹ However, the *Burbank* court failed to note that the Senate Report also revealed that the courts so holding were dealing with local legislation in actual conflict with federal flight regulations.¹⁷⁰ Therefore, the holding of *Burbank* should not be accepted as conclusive of pre-emption in cases where the state or local legislation is *not* in conflict with federal law.

This case law illustrates that there is, at present, no conclusive answer as to whether state regulation of flight for noise abatement purposes is pre-empted by non-conflicting federal regulations. According to the cases, pre-emption should result in this situation where federal jurisdiction is exclusive. However, the courts disagree on whether federal flight regulation is exclusive in the field of flight regulation for noise abatement purposes. The *Cedarhurst* and *Burbank* courts found that there is exclusive jurisdiction due to the extensive federal regulation of flight in this field, whereas the *Loma Portal* and *Morristown* courts held that extensive regulation of flight by federal legislation does not preclude state regulation where it does not conflict with federal law and where it displays an interest in protecting community peace or property.

Considering the substantial need for control of airport noise pollution and the failure of the federal government to provide such noise control regulation, public policy dictates that the *Loma Portal* and *Morristown* cases present the better view. Based on the analysis of these cases, the flight control provisions of the California Regulations should not be invalidated by a claim that they invade an area of exclusive federal jurisdiction.

B. *Undue Burden*¹⁷¹

Another constitutional consideration is whether enforcement of the Regulations by lifting the license of an airport would unreasonably burden interstate commerce. In *Bibb v. Navajo Freight Lines, Inc.*¹⁷² the U.S. Supreme Court noted that a state law will not unduly burden interstate commerce if the total effect of the law is so slight and problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seri-

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See *Buck v. Kuykendall*, 267 U.S. 307, 315 (1925). The Supreme Court here stated the generally recognized principle that state regulation will be invalidated where it unduly burdens interstate commerce.

¹⁷² 359 U.S. 520 (1959).

ously impede it.¹⁷³ There are no exact guidelines for determining when interstate commerce will be "seriously impeded." However, there is little question that lifting an airport license would be an undue burden. Lifting an airport license would require total cessation of interstate flight to or from that airport. This would mean that people would be prevented from reaching their intended destinations. Thus, the effect of this technique on interstate commerce is not slight or problematical but serious and, therefore, unconstitutional.

If the Regulations were amended to provide for enforcement of the noise criteria by the injunction and fine previously suggested,¹⁷⁴ there should be no constitutional problems with enforcement. Neither the affirmative injunction nor fine would unduly burden interstate commerce for neither would require the cessation of interstate flight. These techniques would merely compel airport proprietors to take permissible steps under the Regulations to bring their airports into compliance with the noise criteria.¹⁷⁵ All of the procedures available to the airport proprietor have been held not to unreasonably burden interstate commerce except the approach and the single event noise limit control procedures.¹⁷⁶ The latter two have not been considered by the courts. However, there is little question that these procedures do not unduly burden interstate commerce for they do not inhibit interstate flight in any manner.

The final constitutional issue relates to the cost of implementing the monitoring equipment under the Regulations and whether that cost creates an undue burden on interstate commerce. In *Bibb* the U.S. Supreme Court found that the cost of complying with an Illinois motor safety statute was not unreasonably burdensome of interstate commerce.¹⁷⁷ The cost of compliance was estimated to be \$45,840.¹⁷⁸ Concerning this issue of cost, the Court stated:

Cost taken into consideration with other factors might be relevant in some cases to the issue of burden on interstate commerce. But it has assumed no such proportions here. If we had here only a question of whether the cost of adjusting an interstate operation to these new local safety regulations prescribed by Illinois unduly burdened interstate commerce, we would have to sustain the law . . .¹⁷⁹

The Supreme Court followed the same reasoning in the case of

¹⁷³ *Id.* at 524.

¹⁷⁴ See notes 100-07 and accompanying text, *supra*.

¹⁷⁵ Title 4, CAL. ADM. CODE § 5011 (1970).

¹⁷⁶ See notes 135-51 and accompanying text, *supra*.

¹⁷⁷ 359 U.S. at 526.

¹⁷⁸ *Id.* at 525.

¹⁷⁹ *Id.* at 526.

*Firemen v. Chicago, R.I. & P.R. Co.*¹⁸⁰ The Court sustained a state railroad safety regulation which cost an estimated \$7,600,000 per year.¹⁸¹ The cost of implementing the monitoring equipment under the Regulations does not even approach the cost of compliance with the state law in the above case.¹⁸² Therefore, the cost of the monitoring equipment should not be found to unduly burden interstate commerce.

C. Summary

Apparently, the Regulations are constitutional in all respects except for the license-lifting method of enforcement. However, assuming that this method is declared unconstitutional, this will not affect the validity of the remaining provisions for the Regulations contain a severability clause to this effect.¹⁸³ Furthermore, amending the Regulations to provide for enforcement by the previously suggested injunction and fine procedure¹⁸⁴ would divest the Regulations of any constitutional problems.

CONCLUSION

The California Airport Noise Regulations represent the greatest hope yet to people living within the vicinity of an airport in their quest for a quiet environment. The Regulations require that airport noise levels be progressively reduced to a level no greater than that of normal conversation. By offering an effective noise control system for meeting this goal, the California Regulations constitute the strongest potential assault on the number one problem with airports today—noise.

J. Timothy Doyle

¹⁸⁰ 393 U.S. 129 (1968).

¹⁸¹ *Id.* at 139 n.12.

¹⁸² "The cost of the monitoring equipment under the California Regulations could range from \$9,000 plus the cost of 200 hours per year for personnel to operate the equipment to \$175,000 plus the cost of full time personnel depending on the size of the particular airport and the degree of the noise problem at that airport." Telephone interview with Richard Dyer, Program Manager for Noise Level Control, Cal. Dep't of Aeronautics, Aug. 15, 1971.

¹⁸³ Title 4, CAL. ADM. CODE § 5002 (1970).

¹⁸⁴ See notes 100-07 and accompanying text, *supra*.